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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NATIONAL WOODWORK MANUFACTURERS' ASSN., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered in this case on November 17, 1965.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 14-25) is not yet reported. The Board's findings of fact, conclusions of law, and order (J.A. 2-36)[1] are reported at 149 N.L.R.B. 646.

[1] "J.A." refers to the joint appendix filed in the court of appeals. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court of appeals was entered on November 17, 1965, timely petitions for rehearing were denied on January 24, 1966, and a decree was entered on February 23, 1966 (App. A and B, *infra*, pp. 14, 26-34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a provision in a collective bargaining agreement that the employer shall not purchase prefabricated materials incorporating work which his employees had traditionally performed violates the prohibition of the National Labor Relations Act against "hot cargo" clauses (Section 8(e)), even though the sole purpose of the challenged provision is to preserve the work opportunities of those employees.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*, are printed in Appendix D, *infra*, pp. 37-38.

STATEMENT

A. *The Board's Findings of Fact*

The Metropolitan District Council of Philadelphia and vicinity of the United Brotherhood of Carpenters and Joiners of America is an association of local carpenter unions in the Philadelphia area (J.A. 16-18; 89-91). The Council bargains on behalf of these locals with the General Building Contractors Association,

Inc., the trade association of construction contractors in the area (J.A. 6, 9). For many years, collective bargaining agreements between the Council and the Association have provided (J.A. 10, 16, n. 46; 122-123):

> Rule 17. * * * * No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which have been previously fitted. This section to exempt partition work furnished in sections.[2]

The cutting out and fitting of millwork (including doors) is work that traditionally has been performed by the carpenters employed on the job site, and the purpose of this contract provision was to preserve those tasks for them (J.A. 26-27; 107-111).

In May and June 1963, the Council, invoking this provision, directed employees not to install "pre-cut" doors for their employers, four contractors working in the Philadelphia area under the collective bargaining agreement (J.A. 10-15; 56, 61-67, 69-71, 79-80, 85-

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[2] The first sentence of this provision (omitted in the quotation) provides that no employee shall work on sash, doors, or other millwork that does not bear the label of the Carpenters' Union. This restriction clearly violates Section 8(e) of the Act, the Board so found, and that finding was not challenged by the union in the court of appeals. The "union label" provision has not been enforced for many years. (J.A. 23; App. A, *infra*, p. 16, n. 1).

86, 94-98, 116).[3] Three of the contractors were required by their contracts with the owners of the construction projects involved to install pre-cut, prefinished doors; and the doors that the union refused to hang for these contractors all bore a union label (J.A. 11, 13-15; 58-59, 60-61, 68-69, 78-79).[4] The fourth contractor (Frouge) had ordered pre-cut doors, though not contractually required to do so (J.A. 15; 92, 93, 97); when the union refused to install these doors (which did not bear a union label) Frouge substituted "blank" doors (n. 3, *supra*), whereupon the Council's carpenters installed the substituted doors (which also bore no union label) (J.A. 15-16; 94-98).

B. *The Board's Conclusions and Order*

On these facts, the Board dismissed the allegations in the complaint that the contract provision barring pre-cut doors violated Section 8(e) of the Act (the so-called "hot cargo" section, which invalidates contracts whereby an employer agrees not to handle the products of another employer; App. D, *infra*, p. 38), and that the work stoppages to enforce that provision violated Section 8(b) (4) (A) (which makes it an unfair labor

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[3] A "pre-cut", "pre-fit", or "pre-machined" door is mortised for the knob, routed for the hinges, and bevelled to fit between the jambs prior to its arrival at the job site. A door that has not been prepared in this fashion is called a "blind" or "blank" door (J.A. 9). It appears that in this case pre-cut doors were chosen by the project owners for structural and aesthetic reasons (J.A. 54-55, 58-59).

[4] Later, one of the contractors agreed to pay its employees the wages that they would have received had the disputed work not been performed at the factory, and the union then agreed to and did install the pre-cut doors for him (J.A. 14-15; 80-81, 82).

practice to force or require an employer to enter into a contract that violates Section 8(e))." (App. D. *infra*, p. 37). The challenged provision, the Board ruled, was outside the scope of Section 8(e) because its object was "primary" rather than "secondary"—to preserve work for the employees covered by the agreement rather than (as, for example, in the case of a contract provision forbidding the employer to handle goods not bearing a union label) to place pressure on other employers with whom the union had a dispute (J. A. 26-28).[5] The Board also dismissed the charge in the complaint that the union's efforts to make Frouge abide by the agreement violated Section 8(b) (4) (B) (the "secondary boycott" section, which makes it an unfair labor practice for a union to force any person to cease handling the products of another; App. D, *infra*, p. 37); The Board reasoned that, since Frouge had control over the kind of doors he used, the union's efforts were primary, *i.e.*, to stop Frouge from violating the lawful contract prohibition against the use of prefabricated materials. However, the Board held that the union's refusal to install precut doors for the three employers contractually obligated to use them did violate Section 8(b) (4) (B). The Board reasoned that, since these contractors did not have control over the work that the union sought to protect for its employees, the union's objective was secondary—to compel the project owners to desist from specifying pre-cut doors in their contracts with the contractors. (J.A.

[5] This was shown, for example, by the union's willingness to install "blank" doors that bore no union label and its refusal to hang pre-cut doors that did bear a union label (p. 4, *supra*).

28-30, n. 21). The Board issued a remedial order, limited to the violations of Section 8(b) (4) (B) that it had found (J.A. 34-36).

C. *The Court of Appeals' Decision*

The court of appeals sustained in their entirety the Board's findings with respect to the application of Section 8(b) (4) (B) (App. A, *infra*, pp. 19-20, 25). But it ruled that the challenged contract provision violated Section 8(e) and that the work stoppages called to enforce the provision therefore violated Section 8(b) (4) (A). In the court's view, the challenged provision was designed to effect a product boycott like the one condemned in *Allen Bradley Co.* v. *Local No. 3, Electrical Workers*, 325 U.S. 797, and Congress intended to ban such boycotts (App. A, *infra*, pp. 21-24); the court derived additional support for its conclusion from the construction-industry proviso to Section 8(e).[6]

The court directed the Board to enter an order in accordance with its opinion (App. A, *infra*, p. 25).

REASONS FOR GRANTING THE WRIT

In Section 8(b) 4 (A) of the Taft-Hartley Act Congress made it an unfair labor practice for a union, by means of a strike, to force an employer to refuse to handle the goods of another employer as a means of putting pressure on the latter to negotiate an advantageous contract.[7] But since unions remained free to insert in collective bargaining agreements so-called

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[6] That proviso is set forth in n. 16, p. 12, *infra*.

[7] This provision now appears as Section 8(b) (4) (B) of the National Labor Relations Act, App. D, *infra*, p. 37.

"hot cargo" clauses (*Carpenters' Union* v. *Labor Board* (*Sand Door*), 357 U.S. 93)—whereby the employer would agree not to handle goods that were produced by employers with whom the union was having a dispute or that did not bear a union label—Congress' attempt to deal with the problem of secondary boycotts fell short, and, in 1959, Section 8(e) was added to the National Labor Relations Act, prohibiting and rendering unenforceable any agreement of an employer to refrain from handling any of the products of or doing business with any other employer.[8]

1. The question in this case is whether Section 8(e) also forbids certain common and long-established collective bargaining provisions that have little in common with "hot cargo" clauses. Suppose the parties to a collective bargaining agreement agree—as they did in the present case—that the employer shall not use prefabricated materials embodying work of a kind that his employees have traditionally performed on the job site. The object is to protect the job opportunities of the contractor's employees—not to coerce or influence the producer of the prefabricated materials—but the result is that the contractor is forbidden to use the products of another employer. The same is true if the parties agree that the employer shall not subcontract (or contract out) any of his work: though the sole object of such a clause normally is to protect the job opportunities of the employees of the contractor, rather than to strengthen the union's hand in a dispute with

[8] At the same time, Congress added Section 8(b)(4)(A) to the Act, making it an unfair labor practice to force any employer to enter into any agreement prohibited by Section 8(e).

the subcontractors, the effect is to bar the contractor from doing business with certain other employers. In either case the agreement—although a far cry from a hot cargo clause—is within the literal proscription of Section 8(e).

The Seventh Circuit, in the present case, has ruled that the section is to be given its literal force, so that contractual provisions like that at bar are void. The Fifth Circuit reached the opposite result in a recent decision, holding that Section 8(e) is to be construed in the light of Congress' intent to prohibit only hot cargo and like provisions by which a union enlists one employer to aid it in coercing another. *Houston Insulation Contractors* v. *Labor Board,* No. 21910, decided March 9, 1966.[9] Under the Fifth Circuit's rule, it is clear that the provision at bar is lawful.[10] The Second, Ninth and District of Columbia Circuits are in accord with the Fifth on this point.[11]

[9] The Fifth Circuit's *Houston* opinion is reprinted in App. E, *infra*, pp. 39-51.

[10] It is immaterial that the *Houston* case involved a contractual restriction upon contracting out or subcontracting work traditionally performed by the employees of the bargaining unit involved, while here the restriction is upon the purchase of products on which that work has already been performed. As noted above, in either case the purpose of the provision is to conserve the employees' job opportunities, although a consequence is to bar the employer from doing business with another employer—either directly or by preventing him from handling certain products of the other employer. Moreover, a clause in the contract in *Houston* was actually invoked against a product incorporating the work sought to be conserved.

[11] See *Meat Drivers Local Union 710* v. *Labor Board,* 335 F. 2d 709, 713-717 (C.A. D.C.); *Orange Belt District Council of Painters* v. *Labor Board,* 328 F. 2d 534, 537-538 (C.A. D.C.); *Truck Drivers Union Local 413* v. *Labor Board,* 334 F. 2d 539, 548 (C.A. D.C.), certiorari denied, 379 U.S. 916; *Lewis* v. *Labor Board,* 350 F. 2d 801, 802 (C.A. D.C.); *Labor Board* v. *Joint Council of Teamsters,* 338 F. 2d 23, 28 (C.A. 9); *Todd Shipyards Corp.* v. *Marine and Shipbuilding Workers Union,* 344 F. 2d 107 (C.A. 2).

This conflict among the circuits plainly should be resolved by this Court, and we think this case is a proper occasion. The issue whether Section 8(e) proscribes contract provisions designed to preserve work for employees of the bargaining unit has spawned extensive litigation and learned comment—attesting to its importance.[12] Moreover, it is an issue that goes to the heart of Section 8(e)—a provision yet to come before this Court—and presents a clear-cut question of statutory construction that only this Court can lay to rest. In addition, the issue is inescapably presented by the instant case.

2. We submit that the Board's interpretation of Section 8(e), rejected by the court below (though accepted by four other circuits), is correct. Although the language of Section 8(e) is broad enough to encompass any agreement that binds an employer not to handle products of another employer, little weight can be assigned this factor. The language of the section was intended to track closely the language of Section 8(b)

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[12] In addition to the cases cited in n. 11, *supra*, see, *e.g.*, *International Longshoremen's Association, Local 1694*, 331 F. 2d 712; *Retail Clerks Union Local 770* v. *Labor Board*, 296 F. 2d 368 (C.A. D.C.); *National Labor Relations Board* v. *Local 294, Teamsters*, 342 F. 2d 18 (C.A. 2); *Retail Clerks Union Local 1428* (*Food Employer's Council*), 155 N.L.R.B. No. 74, November 9, 1965; *Local 282, Teamsters* (*Holmes Trucking*), 155 N.L.R.B. No. 102, November 17, 1965; *United Association Pipefitters* (*American Boiler Manufacturers' Association*), 154 N.L.R.B. Nos. 11, 12, August 5, 1965, pending on petitions to review and enforce, C.A. 8, Nos. 18106, 18107, 18200; Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000 (1965); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 272-274 (1959); Hickey, *Subcontracting Clauses Under Section 8(e) of the NLRA*, 40 Notre Dame Lawyer 377 (1965); Note, 53 Geo. L. J. 847 (1965); Note, 71 Yale L. J. 158 (1961); Comment, 62 Mich. L. Rev. 1176 (1964).

(4) (B) (the secondary-boycott provision)—the purpose of 8(e) being to close a loophole that had appeared in the enforcement of 8(b) (4) (B)—and 8(b) (4) (B), despite its literal breadth, had been interpreted as limited to conduct motivated, not by any concern over the working conditions of the employees immediately involved, but rather by desire to exert pressure on some other employer. *See Local 761, Electrical Workers* v. *Labor Board,* 366 U.S. 667; *United Steelworkers* v. *Labor Board,* 376 U.S. 492. There is no reason to think a broader prohibition was intended by Congress' choice of comparable language in Section 8(e).

Furthermore, in enacting 8(e) Congress was concerned with a particular, limited evil—the "hot cargo" clause.[13] There is no persuasive evidence that it also intended to strike down traditional contract provisions (such as those protecting the work opportunities of the employees of a particular plant or site) over which the employer has a duty to bargain (*e.g., Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203; *Local 24, Teamsters Union* v. *Oliver,* 358 U.S. 283), and which do not pose the same concerns from a public-policy standpoint. This is not to say that provisions like that at bar (though, to repeat, they are familiar objects of the

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[13] See S. Rep. No. 187, 86th Cong., 1st Sess. 79-80 (minority views), I Leg. Hist. 475-476; H. Rep. No. 1147, 86th Cong., 1st Sess. 39, I Leg. Hist. 943. See, also, II Leg. Hist. 1161-1162, 1432, 1568, 1721, 1857; 105 Cong. Rec. 6556, 17899, 15532, 18134, 19771. "Leg. Hist." refers to the two-volume *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (Government Printing Office, 1959).

collective bargaining process) may not raise serious questions of public policy. A provision that prevents a building contractor from reducing his labor costs by using pre-assembled materials, like a provision barring automation, might strike some as highly questionable from an economic standpoint.[14] But, if perhaps questionable on other grounds, such provisions have none of the unfair and oppressive characteristics of "hot cargo" clauses and secondary boycotts, since they do not involve the conscription of a neutral employer in a campaign to coerce another employer with whom the union has a disagreement.[15] Section 8(e) was never intended to resolve whatever questions of public policy inhere in agreements so radically different in purpose and nature from those the framers of the statute desired to reach.

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[14] As noted in the Statement, *supra*, p. 4, n. 3, the prefabricated materials involved here were chosen by the project owners for structural and aesthetic reasons, and there is no evidence to what extent (if any) price was a factor.

[15] In a phase of the case not covered by this petition, the Board held that, while the contract clause challenged in this case was a legitimate work-preservation clause, and hence outside the scope of Section 8(e), the union engaged in a secondary boycott in violation of Section 8(b)(4)(B) when it struck to prevent contractors from hanging pre-cut doors that they were obligated by their contracts with the project owners to hang. Statement, *supra*, p. 5. The Board reasoned that since, in these instances, the contractor was without legal power to refuse to hang the doors, the union's dispute was not really with the contractor, but with the project owner for imposing this condition on the contractor, and thus the strike against the contractor was analogous to a strike against a neutral employer in order to put pressure on another employer (here, the project owner) with whom the union had the primary dispute. The consequence of this reasoning is that, where enforcement of a contract provision lawful under Section 8(e) is coupled with an objective forbidden under Section 8(b)(4)(B), a strike to enforce the contract may

Failure to recognize this fundamental point led the Seventh Circuit in this case to the view that the prohibition of Section 8(e) extends to any agreement that has the effect of causing the contracting employer to cease doing business with another and that the only exceptions are those expressly provided in the statute.[16] Agreements like that at bar, which are not intended to coerce a neutral employer, are not subject to Section 8(e) to begin with. Hence, it is irrelevant whether they satisfy the conditions of one of the statutory exceptions. The purpose of the construction-industry proviso is to privilege a limited class of agreements that are secondary in nature and so would otherwise be proscribed by Section 8(e)—for example, an agreement that the general contractor shall use only union subcontractors on the job.[17] Here, there is no such secondary objective.

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be illegal (but cf. the strike against Frouge Corp., Statement, *supra*, p. 5). Even in such instances, however, the union would presumably remain free to enforce the contract provision by a suit for breach of contract. See *Sheet Metal Workers* v. *Hardy Corp.*, 332 F.2d 682 (C.A. 5).

[16] Section 8(e) has two provisos, one for the construction industry and the other for the garment industry. The construction-industry proviso provides:

> * * * [N]othing in this subsection (e) shall apply to an agreement between a labor organisation and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *.

This proviso was not satisfied here, since the doors were not manufactured on the job site.

[17] See H. Rep. No. 1147, 86th Cong., 1st Sess. 39-40, I Leg. Hist. 943-944; 105 Cong. Rec. 17900, II Leg. Hist. 1433; 105 Cong. Rec. 19772, II Leg. Hist. 1858.

Nor does *Allen Bradley Co.* v. *Local No. 3, Electrical Workers*, 325 U.S. 797, support the result reached by the court below. There (as in the other cases relied on by the court below, see App. A, *infra*, pp. 21-24), the union's purpose was not to protect the work opportunities of the employees immediately involved, but to further some other objective elsewhere. Thus, in *Allen Bradley*, the union induced members employed by electrical contractors in New York City to refrain from installing equipment manufactured outside of the city, not in order to protect the work of the contractors' employees, but, rather, in order to create a sheltered market for the New York City manufacturers, whose employees were also represented by the union. See Lesnick, *supra*, p. 9, n. 12, at pp. 1017-1018.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1966.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 14904, 14988, 15064

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 14904

NATIONAL WOODWORK MANUFACTURERS ASSN., et al., PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

No. 14988

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, RESPONDENT.

No. 15064

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

On Petitions to Review, and Petition to Enforce, and Order of the National Labor Relations Board.

NOVEMBER 17, 1965

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*

SCHNACKENBERG, *Circuit Judge.* Petitioner, National Woodwork Manufacturers Association, on behalf of its members, Hardwood Products Corporation, a Wisconsin corporation, and Mohawk Flush Doors, Inc., an Indiana corporation, herein called "NWMA", "Hardwood", and "Mohawk", respectively, asks us in No. 14904 to review and modify an order of the National Labor Relations Board, herein called the "Board", issued on November 12, 1964, dismissing, in part, a complaint against Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al., herein called the "Council" or the "Union".

In No. 14988, NWMA and Charles B. Manin, an individual, made charges upon which the Board issued a complaint an August 27, 1963, and its amended complaint on October 4, 1963, alleging that respondent unions had engaged and were engaging in unfair labor practices in violation of section 8 (b) (4) (A), section 8 (b) (4) (B), and section 8 (e) of the Labor Management Relations Act of 1947, as amended, herein called the "Act", 29 U.S.C.A. § 158. In No. 14988, the Board seeks enforcement of its order entered against the Council and its affiliated local unions.

In No. 15064, the Council, Robert L. Gray and Charles L. Boyer, by their petition, seek an order setting aside the order of the Board to the extent that it finds against them and imposes sanctions on them.

Following a hearing before an examiner and the filing of his decision, the Board issued the aforesaid order of November 12, 1964, which dismissed all charges of violations except those with respect to the Union's conduct on three construction jobs described as (1) the Coatesville Hospital job, at which L. F. Driscoll Company was general contractor; (2) the North Junior High School job, at which John J. McDonnell, Inc., was

general contractor; and (3) the St. Aloysius Academy job, at which Nason & Cullen, Inc., was general contractor; as to each of which the Board found violations of section 8 (b) (4) (B) but granted what NWMA considers only partial and inadequate relief.

Twenty-seven local carpenter unions in Philadelphia and in four other counties in Pennsylvania are affiliated with the Metropolitan District Council of Philadelphia and Vicinity. These locals are "serviced" by 11 business agents who work directly under Gray, the Council's secretary-treasurer and business manager. These business agents police the jobs and see that contracts are adhered to.

The Council engages in collective bargaining with individual employers and with the General Building Contractors' Association, Inc. (GBCA), which bargains on behalf of its employer members who build schools, hospitals, factories, and other structures in the Philadelphia area. The contracts in effect during the relevant period contain a provision similar to rule 17 of the Union's bylaws, which reads as follows:

> Rule 17. No employee shall work on any job on which cabinet work, fixtures, millwork, sash, doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America.[1] *No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair,*

[1] The first sentence in Rule 17 concededly violates section 8(e) but no issue is presented here concerning that aspect of the case.

rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections. (Emphasis added.)

It is petitioner's contention in No. 14904 that the Union engaged in an unlawful product boycott of prefabricated doors in the Philadelphia area and enforced an illegal hot-cargo contract prohibiting the use of such prefabricated doors [2] throughout said area.

Prefabricated doors are doors which are machined, processed and finished in various ways at the plants where they are manufactured. There was testimony that the use of prefabricated doors saves time and money.

Petitioner cites, as a matter of common knowledge, that the use of prefabricated doors has been greatly increasing in the construction industry, which extends to numerous other parts of building, such as windows, factory-built trusses, wall and partition assemblies, prefinished paneling, prefabricated kitchens and bathrooms, and on up to the point of prefabricated houses and other buildings.

Prior to the present proceedings a letter was written in February, 1963, by Business Manager Gray of the

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[2] (1) Prefitted doors which have been cut to exact size and beveled at the factory, so that they will fit into frame openings on the job without further machining.

(2) Precut doors which have been machined at the factory to receive hardware (locks, knobs, hinges, etc.), louvers, glass openings, and the like.

(3) Prefinished doors which have been preservative-treated, sealed, varnished, painted, or otherwise finished at the factory for ultimate use without further finishing. (Such doors must be completely machined before the final finish is affixed at the factory.)

(4) Armored doors which are completely machined at the factory and have plastic or other wear-resistant materials laminated to sufaces and edges.

(5) Prehung doors which are completely machined and assembled in door-frame units at the factory.

Council to President Hutchinson of the United Brotherhood of Carpenters, stating that there was a serious problem of precut and prefitted doors coming into the Philadelphia area. Then followed a union drive to bar all prefabricated doors, which was implemented by the alleged boycotts and work stoppages that led to the NWMA charges against the Union and these proceedings.

Typical of the operation of the Union drive in this respect was the Coatesville Hospital job in May 1963. Driscoll, the contractor, purchased through a Pennsylvania millwork distributor, prefabricated architectural doors made by Hardwood for this job. In accordance with the architect's common practice, the specifications called for precut, prefitted and prefinished doors. On May 23, the day after the doors were delivered to the job, Union agent Boyer called from the job and told vice-president Brown of Driscoll that the prefinished doors could not be hung, because it was "in violation of an agreement". When Brown asked "where do we go from here?", Boyer said that he did not know and that if the doors were hung anyhow, the job would be "struck". Boyer admitted that his word was not final and that Brown could take it up with Gray. Brown then called Gray and stated what had occurred, but Gray said that "no carpenters from now on will hang prefinished or pre-fit doors." Brown asked what could be done, because the hospital was hoping to get into the building, and Gray said that was not his problem. Thereupon Driscoll's secretary telephoned Gray and asked for an explanation and was told that Driscoll was in violation of rule 17 because the doors had been factory precut, and that the carpenters were not allowed to hang them. From May 23, when the Union carpenters discovered the doors on the job, until May 27, they re-

fused to hang them. They were then hung after the contractor agreed to pay the carpenters for work which they did not perform.

Such a solution was not reached in the North Junior High School, St. Aloysius Academy or Frouge Corporation jobs, the first two of which are factually not different from the Coatesville Hospital job.

Frouge Corporation was the general contractor on a housing project in Philadelphia, for which it ordered factory-machined Mohawk doors. Neither job specifications nor Frouge's contract required that the doors be precut, prefitted, or premachined. When the second shipment thereof arrived, Union agents did not allow their men to work on them. They cited rule 17 which was then shown to and read by President Frouge and Project Manager Green. Frouge had Green order 665 Mohawk doors, which, when delivered, did not bear a union label. Union carpenters did the cutting on the replacement doors which were then installed on the job.

The Board held that the Union violated § 8 (b) (4) (i) (ii) (B), by reason of its boycott of prefabricated doors on the Coatesville, North Junior High and St. Aloysius jobs, but as to Frouge, it held otherwise, giving as its reason, that, while in the first three jobs the specifications called for prefabricated doors and hence the Union target was the doors and persons making and distributing them, in *Frouge* the Union boycotted prefabricated doors which had been purchased by the contractor—but which were *not required* by job specifications. This conclusion seems to indicate that the Board held that the Union's target in *Frouge* was not the prefabricated doors and their manufacturer but rather contractor Frouge and that the situation involved only a primary dispute with him. We agree.

Section 8 (b) (4) (i) (ii) (B) reads as follows:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . . . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> . . . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, *any primary strike or primary picketing* [emphasis supplied] . . . .

We hold that Frouge was the object of a "primary strike or primary picketing" and therefore the Union was entitled to the protection of the proviso in § 8(b) (4) (B).

We now consider the objections of the Union to the Board's finding of violations of § 8 (b) (4) (B) as to the first three contractors above-named.

The language of the statute and its legislative history clearly indicate that § 8 (b) (4) (B) applies to the product boycott carried on by the Union in this case under its rule 17. In *Allen Bradley Co.* v. *United States*, 325 U.S. 797 (1945), it appeared that Local 3 of the Electrical Workers Union and the Electrical Contractors of New York City had agreed on work rule restrictions, under which Local 3 refused to handle or install electrical fixtures and equipment made or assembled outside the New York City area. It was agreed that, in lieu of absolute prohibition, the union would dismantle and rebuild the "foreign" equipment or be paid the equivalent thereof. Local 3 had no active labor dispute with the "foreign" manufacturers, nor did it have any interest in the working conditions at such factories. It was not concerned with whether the "foreign" fixtures were union made—in fact, it barred fixtures made by its sister local union in New Jersey. Further, Local 3 was not concerned with whether the immediate contractor had or did not have "control of the work." Clearly, the union's ultimate objective was to preserve work for its members. The intermediate objective, as the means to its ultimate goal, was the boycott of foreign products. It was the inadequacy of antitrust remedies, demonstrated in *Allen Bradley, supra,* that led directly to the Taft-Hartley prohibition of secondary boycotts.[8]

Our own court in *Joliet Contractors Association* v. *National Labor Relations Board,* 202 F. 2d 606 (1953), cert. den. 346 U.S. 824, considered an area boycott similar to that in *Allen Bradley*. It was a typical product boycott case. There Glazier's Union Local 27 had a rule that preglazed window sashes could not be installed, and the union's bylaws and agreements with the

[8] Legislative History of the Labor Management Relations Act, 1947, pp. 1055-1056, 93 Cong. Rec. 4255.

contractor provided that all sash and glass work must be done on each respective job site or building. We rejected the argument there made that the union's dispute with the contractor was only primary and that its objective was preservation of work on the job, saying, at 610:

> "* * * the fact remains that the target was the use of preglazed sash, and any and all who handled, used or sold such sash were the intended and in many cases the actual victims of the Union's course. Moreover, we are not convinced that a Union violation of the provision under discussion is dependent upon whether its activities are primary or secondary. * * *"

In the case at bar the Union's target was and is prefabricated doors. Neither here nor in *Joliet Contractors* was there a labor dispute between the union and any manufacturer.[4] In *Joliet Contractors* we found the union's refusal to install such products to be a violation of § 8 (b) (4) (A).[5] At that time the proviso in § 8 (b) (4) (B) had not been enacted.

We find nothing to the contrary in *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al.*, 366 U.S. 667 (1961), relied on in the brief of the Union.

Our views find support in *National Labor Relations Board v. Local 11, United Brotherhood of Carpenters, etc.*, 6 Cir., 242 F. 2d 932 (1957) which involved § 8 (b) (4) (A)[6] of the Act. The Board there contended that the carpenters' union induced a concerted refusal by

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[4] As in *Allen Bradley*, in the case at bar the Union was not concerned with whether the boycotted doors were union made.

[5] Now known as (B).

[6] Now known as (B).

the employees of the subcontractors to handle prehung doors in a building-project in Ohio, which doors had been manufactured in Indiana and Michigan and were sold as component parts of prefabricated home units to the general contractor in the Cleveland, Ohio area.

Judge Stewart (now Justice Stewart) said at 934:

> "Substantially adopting the Trial Examiner's Intermediate Report, a majority of the Board found the respondents had induced and encouraged employees of the subcontractors to engage in a concerted refusal to handle the prehung doors, and that objectives of the respondents' conduct were to force or require the subcontractors to cease using prehung doors, to force or require Erie Building Company to cease using and purchasing prehung doors, and to force or *require Scholz Homes, Inc., to cease doing business with the manufacturers of the doors.* (Italics supplied.)
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> • • • • •
>
> "The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8 (b) (4) (A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. N. R. L. B. [sic] v. Washington-Oregon Shingle Weavers' Dist. Council, 9 Cir., 1954, 211 F. 2d 149, 152-153.
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> • • • • •
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> "This brings us to the respondents' primary defense. They say that even if they encouraged and induced a concerted work stoppage by employees with respect to the doors, this did not constitute an

unfair labor practice within the meaning of § 8 (b) (4) (A) because the immediate employers (the subcontractors) had acquiesced in advance in the employees' action by virtue of a collective bargaining agreement containing a 'hot cargo' clause, and also by reason of the fact that the subcontractors themselves [sic] belonged to the union, and as union members were obligated not to use the prehung doors. Although the Board found upon conflicting evidence that no collective bargaining agreement containing a 'hot cargo' clause was then in effect, it is conceded that the subcontractors were members of the union and that they acquiesced in the conduct of their employees in not handling or working on the doors in question."

By an amendment enacted in 1959, subsection (e) was added to § 8 of the Act, 29 U.S.C.A. § 158, providing, in part:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: * * *.

The distinction between job site work and factory-made products is recognized in the foregoing construction proviso of § 8 (e) itself. The legislative history shows that it was explained by Senator Kennedy that the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite."[7]

We hold that § 8 (e) unaffected by the proviso is controlling in this case.

For all of these reasons, that part of the Board's order entered November 12, 1964, dismissing, in part, the complaint against the Council is set aside and this cause is remanded to the Board with instructions to enter an order finding that the Council violated § 8 (b) (4) (i) (ii) (A) and § 8 (e) of the Act, as set forth herein, as well as § 8 (b) (4) (i) (ii) (B) to the extent found by the Board, which action we affirm.

The Board is directed to restrain any further such proscribed violations of the Act by the Council in the Philadelphia area.

In Part Affirmed and In Part Set Aside and Remanded With Directions.

A true Copy:

Teste:

_____, ____.

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[7] J.A. 135; II Leg. Hist., p. 1443.

APPENDIX B

Filed Feb. 23, 1966, Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14,904

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, a non-profit corporation for itself and on behalf of its members, and HARDWOOD PRODUCTS CORPORATION, a Wisconsin corporation, and MOHAWK FLUSH DOORS, INC., an Indiana corporation, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

No. 14,988

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and its affiliated Local Unions, and Robert H. Gray and Charles L. Boyer, RESPONDENTS.

No. 15,064

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and Robert H. Gray and Charles L. Boyer, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Decree

Before: Hastings, Chief Judge, and Schnackenberg and Knoch, Circuit Judges.

The above consolidated cases came on to be heard upon petitions to review and a petition to enforce an Order of the National Labor Relations Board, dated November 12, 1964. The Court heard argument of respective counsel on October 18, 1965, and has considered the briefs and transcript of record filed in these proceedings. On November 17, 1965, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's said order respecting certain violations of 8 (b) (4) (i) (ii) (B) and remanding to the Board with instructions to enter an order finding that Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and its affiliated Local Unions, and Robert H. Gray and Charles L. Boyer (herein referred to as the Council) violated 8(b)(4)(i)(ii)(A) and 8(e) of the Act as set forth in the opinion, and restraining any further such proscribed violations of the Act by the Council in the Philadelphia area. In conformity with the Board's original order aforesaid, which is the only order presently before the Court, and pending the Board's entry of its new order embodying the additional violations found by this Court, it is hereby

Ordered, Adjudged and Decreed that:

1. Respondents, Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and

its Affiliated Local Unions, their officers, representatives, agents, successors, and assigns, shall:

A. Cease and desist from entering into and maintaining any agreement containing the "Union Label" sentence of Working Rule 17, or any like or related provision.

B. Take the following affirmative action which has been found necessary to effectuate the policies of the National Labor Relations Act (hereinafter called the Act).

(1) Post in conspicuous places in Respondents business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Fourth Region (Philadelphia, Pennsylvania), shall, after being duly signed by Respondents' authorized representatives be posted by Respondents immediately upon receipt thereof and be maintained by them for 60 consecutive days. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced, or covered by any other material.

(2) Furnish to the said Regional Director signed copies of the aforementioned notice for posting by L. F. Driscoll Company, Frouge Corporation, and by any employers in the Philadelphia, Pennsylvania, area who are members of the General Building Contractors Association which has a collective-bargaining agreement with Respondents, if said Employers agree, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional

Director shall, after being signed by Respondents as indicated, be forthwith returned to the Regional Director for disposition by him.

(3) Notify the said Regional Director in writing, within 10 days from the date of this Decree, what steps the Respondents have taken to comply herewith.

2. Respondent Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its officers, representatives, successors, assigns and agents, including Robert H. Gray and Charles L. Boyer, shall:

A. Cease and desist from inducing or encouraging any individual employed by Nason and Cullen, Inc., John J. McDonnell, Inc., L. F. Driscoll Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, and cease and desist from threatening, coercing, or restraining any of the aforenamed employers or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require any of the aforementioned employers or persons to cease doing business with mill suppliers, including T. W. Hammond & Bros., John A. Yohn Co., and Boyertown Planing Mill Co., or to force or require said mill suppliers to cease doing business with door manufacturers, including Oxford Plastics Co., and Hardwood Products Corporation.

B. Take the following affirmative action which has

been found necessary to effectuate the policies of the Act:

(1) Post in conspicuous places in Respondents' business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto and marked "Appendix B." Copies of said notice to be furnished by the aforesaid Regional Director, shall, after being duly signed by the representatives of Respondents and by the individual Respondents herein, be posted by said Respondents, as aforesaid, immediately upon receipt thereof and maintained by them for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(2) Furnish to the said Regional Director signed copies of the aforementioned notice for posting by each of the employers and persons mentioned in paragraph 1 B, (2) *supra,* who are willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being signed by Respondents, as indicated, be forthwith returned to the Regional Director for disposition by him.

(3) Notify said Regional Director in writing, within 10 days from the date of this Decree, what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this cause be, and hereby is, remanded to the Board with instructions to enter an order finding that the Council violated Section 8(b)(4)(i)(ii)(A) and Section 8(e)

of the Act, as set forth in the opinion of this Court. Upon presentation, an appropriate decree will be entered as to the violations of Section 8(b)(4)(i)(ii)(A) and 8(e).

/s/ ELMER J. SCHNACKENBERG,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ JOHN S. HASTINGS,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ WIN G. KNOCH,
Judge, United States Court of Appeals for the Seventh Circuit.

A True Copy:

Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix A*

Notice Pursuant to

A Decree of the United States Court of Appeals Enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not enter into or maintain any agreement containing the "Union Label" sentence of working Rule 17, or any like or related provision.

Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(Labor Organization)

Dated —

By ——, ——,

(Representative) (Title)

The Affiliated Local Unions.

(Labor Organization)

Dated —

By ——, ——,

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania 19107 (Tel. No. 735-2612), if they have any question concerning this notice or compliance with its provisions.

* Appendix to decree.

Appendix B *

Notice Pursuant to

A Decree of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not induce or encourage any individual employed by Nason and Cullen, Inc., John J. McDonnell, Inc., L. F. Driscoll Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to handle, work on, or perform any services on, precut or prefit, millwork, including precut or prefit doors, and We Will Not threaten, coerce or restrain any of the aforenamed employers or any other person engaged in commerce or in an industry affecting commerce, where in either case, as object is to force or require any of the aforementioned employers or persons to cease doing business with mill suppliers, including T. W. Hammond & Bro., John A. Yohn, Co., and Boyertown Planing Mill Co., or to force or require said mill suppliers to cease doing business with door manufacturers, including Oxford Plastics Co. and Hardwood Products Corporation.

Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

(Labor Organization)

* Appendix to decree.

Dated —

By ——, ——,
(Representative) (Title)

Dated —

By Robert H. Gray, Secretary-treasurer.

Dated —

By Charles L. Boyer, Representative.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania 19107 (Tel. No. 735-2612), if they have any question concerning this notice or compliance with its provisions.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Monday, January 24, 1966

Before: Hon. JOHN S. HASTINGS, Chief Judge, Hon. ELMER J. SCHNACKENBERG, Circuit Judge, Hon. WIN G. KNOCH, Circuit Judge.

No. 14904

Petition for review of an order of the National Labor Relations Board.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT;

No. 14988

Petition for enforcement of an order of the National Labor Relations Board.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA, ETC., ET. AL., RESPONDENTS;

No. 15064

Petition for review of an order of the National Labor Relations Board.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY, ETC., ET AL., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

IT IS ORDERED by the Court that the petition for rehearing filed by National Woodwork Manufacturers Association, et al. and the petition for rehearing filed by the National Labor Relations Board be, and the same are hereby DENIED.

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*, are as follows:

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlaw-

ful, where not otherwise unlawful, any primary strike or primary picketing; * * *

* * * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21910

HOUSTON INSULATION CONTRACTORS ASSOCIATION, PETITIONER,

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Petition for Review of an Order of the National Labor Relations Board Sitting at Washington, D. C.

(March 9, 1966.)

Before WOODBURY,* WISDOM and BELL, Circuit Judges

WOODBURY, Senior Circuit Judge: This is a petition to review and set aside an order of the National Labor Relations Board dismissing a complaint issued upon charges filed in an association of contractors against two local unions and their parent union.

The petitioner, Houston Insulation Contractors Association, Contractors Association or simply Association, hereinafter, consists of a group of contracting companies in the Houston area banded together for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO. Article VI of the collective bargaining agreement in force between these parties at the time involved provided in material part: "The Employer agrees that he will not sublet or contract out any work described in Article

* Senior Judge of the First Circuit sitting by designation.

XIII," which included "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, boilers, tanks etc.

Johns-Manville Sales Corporation is a member of the Contractors Association. In 1963 it was engaged in applying insulation to pipe at a construction project at Texas City, Texas, within the territorial jurisdiction of Local 22. In order to secure the insulation to the pipe Johns-Manville's employees cut coils of stainless steel sheets into strips or bands used to hold the insulation around the pipe. In June or July Johns-Manville purchased pre-cut stainless steel bands from Techalloy Company, Inc., a non-union producer of metal products. Johns-Manville employees at the direction of their union officers refused to apply the pre-cut bands.

Armstrong Contracting and Supply Corporation is another member of the Contractors Association. In 1963 it was engaged in applying asbestos insulation to pipes at a construction project in Victoria, Texas, which is not within the territorial jurisdiction of Local 22, but of Local 113 of the International Union. For several years Armstrong had purchased straight lengths of premoulded asbestos insulation from Thorpe Products Company, a non-union firm, which Armstrong's union employees had mitered, that is to say, cut at angles with a saw and glued the cut sections together so that the straight-length material could be used to cover curves or angles in pipe. Originally mitering had been done on the job with hand tools. At the time involved, however, and apparently for several years before, mitering had been done in Armstrong's shop in Houston by its employee-members of Local 22 using power tools inconvenient to move and the mitered fittings delivered to the jobsite. In the summer of 1963 Armstrong purchased pre-mitered fittings from

non-union Thorpe Products Company. Armstrong's employees on the Victoria job, members of Local 113, at their union officers' direction refused to apply these pre-mitered fittings.

The Contractors Association filed charges against the International Union and its Locals 22 and 113 on which general counsel for the Board issued a complaint charging that the refusals to apply the goods of Thorpe and Techalloy constituted an unlawful secondary boycott within the meaning of § 8(b)(4)(i) and (ii) (B) of the National Labor Relations Act as it now stands amended, 29 U.S.C. § 158(b)(4)(i) and (ii)(B),[1] asserting that at least "an object" of the refusal to apply, which admittedly amounts to coercion, was to require Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. The International Union and the Locals denied that the refusals to use and apply the products of Thorpe and Techalloy constituted a secondary boycott. They asserted that the refusals were protected primary ac-

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[1] "It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . ., to engage in, a strike or refusal in the course of his employment to use, . . . process, . . . or otherwise handle or work on any goods, articles, materials, or commodities . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . . .

* * * * *

"(B) forcing or requiring any person to cease using, . . . handling, . . . or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . ."

tivity because the sole object thereof was to preserve work their members were entitled to perform by virtue of the ban on subcontracting in the collective bargaining agreement.[2]

After hearing, the trial examiner found that "this was not a boycott of nonunion products." And he ruled that "Articles VI and XIII of the agreement with the Contractors Association are lawful." Nevertheless he concluded that the refusal to handle Thorpe and Techalloy products was unlawful wherefore he recommended a cease and desist order against the local unions but not against the International Union saying that the dispute was a local one and that he had "no evidence that the International directed it or intervened in it."

The trial examiner rested his conclusion of unlawful activity by the local unions on § 8(e) of the Act, 29 U.S.C. § 158(e), quoted in material part in the margin.[3]

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[2] In the contract between Local 22 and the Contractors Association the employers agreed that in their operations outside the chartered territory of Local 22 they would abide by the rates of pay, rules and working conditions established by collective bargaining contracts between local insulation contractors and the local union in that territory. Local 113's contract with employers operating within its territorial jurisdiction where the work stoppage involving Armstrong's employees occurred contains a ban against subcontracting similar to the one in the contract between the Contractors Association and Local 22.

[3] "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract . . . containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, . . ."

He said that the agreement between the Contractors Association and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)." But he said that the exemption did not apply because the evidence was clear that mitering and cutting bands, even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite. In addition he ruled that, even if the workers were entitled to preserve the work of mitering and cutting bands by the contract, they were not entitled under the rule of the so-called *Sand Door* case, *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958), to resort to economic coercion to enforce the contract.

The three-member panel to which the Board delegated its powers pursuant to § 3(b) of the Act disagreed with the trial examiner and ordered the complaint dismissed in its entirety. Without discussing the impact of § 8(e) of the Act, although that section provided the basis for the trial examiner's decision, the panel held that the activities of the two local unions were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement the lawfulness of which it said appeared to be conceded. On the basis of its conclusion of no unlawful activity by the local unions, it dismissed the complaint as to the International Union.

One member of the panel dissented from the order insofar as it dismissed the charge against Local 113. The majority of the panel pointed out that although Local 113 had no contact with the Contractors Association, nevertheless the Association had agreed with Local 22 that its member companies when operating outside the territorial jurisdiction of that union would "abide by the rates of pay, rules and working conditions estab-

lished by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and that Local 113's contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Association. Wherefore the majority held that whether Local 113 be "regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22, it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." The dissenting member of the panel said that Local 113 was not a third-party beneficiary of Local 22's bargaining contract with Armstrong and that there was nothing to show that it was acting as agent for Local 22. He considered that since Local 113 had no agreement with the Contractors Association, its attempt to enforce the contract for the benefit of Local 22 constituted unlawful secondary activity.

The petitioner insists in this Court that both the facts and the law require the Board to find that all three unions had violated § 8(b)(4)(i) and (ii)(B) of the Act.

On the facts, the petitioner contends that the record conclusively shows that "an object" of the refusals to apply was to force Johns-Manville and Armstrong to cease doing business with Techalloy and Thorpe. In support of this contention it would have us give conclusive effect to the testimony of one Brooks Baker, an officer of Local 22 and a vice-president of the International Union, who at one point testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy." This testimony does indicate that Baker at least may have believed that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with

Thorpe and Techalloy. But the Board was not required as a matter of law to accept Baker's statement as gospel in the fact of ample testimony, including later testimony of Baker himself, to the effect that the unions' objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and premitered fittings. It may well be that the union officials hoped and expected, certainly we may assume that they would not have minded, if a result of their members' refusal to use and apply the bands and fittings was to put pressure on Techalloy and Thorpe as non-union employers. But hopes and expectations do not necessarily constitute "objects." An illegal "object" is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend. See *Retail Clerks Union Local 770* v. *NLRB*, 296 F. 2d 368, 373 (C.A.D.C. 1961). The distinction to be drawn as best one can is between an object and a consequence. See *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 672 *et seq.* (1961).

The petitioner also would have us find conclusive evidence of an unlawful union object in its use of gummed labels or decals. These were supplied by the International Union to employers under contract with its locals and were applied by the union workers to the goods they made. The decals bore serial numbers by which the employer could be identified. When Johns-Manville and Armstrong employees received the Techalloy bands and Thorpe mitered fittings without decals they refused to apply them.

The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting. Moreover, there is undisputed testimony that other products of Thorpe and Techalloy purchased by Armstrong and Johns-Manville, which of course did not bear union decals, were not boycotted, and there is testimony that certain products made by union members and labeled as such were not applied when the serial numbers on the decals indicated that the products were not fabricated by employees entitled to the work under the contract.

Finally the petitioner relies on four other cases involving the same International Union and various of its locals as establishing an illegal pattern of union conduct. Apart from the broad proposition that past misconduct is not conclusive evidence of present guilt, the cases relied upon are clearly distinguishable. Three of them, *International Association etc. and Local 24 (Speed-Line Mf'g Co., Inc.)*, 137 NLRB 1410 (1962); *International Association etc. and Local 125 (Insul-Caustic Corp.)*, 139 NLRB 659 (1962), and *International Association and Local 2 (Speed-Line Mf'g Co., Inc., and Fibrous Glass Products, Inc.)*, 139 NLRB, 688 (1962), involved "premolded" fittings, not "prefabricated" ones as in the case at bar. The distinction, as the Board pointed out, is crucial, for prefabricated fittings are essentially hand made and could and customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation. Neither Thorpe nor Armstrong makes or has the facilities to make premolded fittings. Nor do the members of the

locals have the skills to make such fittings. Thus in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings.

The fourth case relied upon by the petitioner was decided by the Board subsequent to the case at bar and involved the same parties. *Local 22 International Association etc. and Houston Insulation Contractors Association (Mundet Cork Co.)*, 150 NLRB 156 (1965). In that case members of Local 22 employed by Mundet Cork Co. refused to apply aluminum jacketing supplied by Johns-Manville ostensibly because it did not bear the union decal although in fact it had been made by union labor. The case is a peculiar one but it is readily distinguishable on the trial examiner's finding that the particular aluminum jacketing made by Johns-Manville had never been made and could not have been made by the Mundet employees and hence was not work within the contractual ban on subcontracting.

On the law, the petitioner relies primarily upon § 8(e) of the Act quoted in material part in footnote 3, *supra*. It asserts and we agree that the proviso exempting subcontracting jobsite work in the construction industry does not apply because the Board did not disturb the trial examiner's finding that the mitering and cutting of bands, even when performed by Armstrong and Johns-Manville employees, was performed in their shops and not at the jobsite. But we do not agree with the petitioner that § 8(e) absent its proviso renders the contractual ban on subcontracting unenforcible and void.

It is, of course, true that the agreement not to sub-

contract the work of preparation or application of insulation materials is in a certain sense an agreement whereby the employer agrees to refrain from handling, using or otherwise dealing in the products of another employer, if not also an agreement not to do business with another person. But to hold that a provision in the collective bargaining agreement against subcontracting was void and unenforcible because of its secondary effects would not square with *Fibreboard Corp.* v. *NLRB,* 379 U.S. 203 (1964), in which the Court held that "contracting out" work previously performed by members of an existing bargaining unit was a statutory subject of collective bargaining under § 8(d) of the Act. Section 8(e) was aimed at so-called "hot cargo" agreements whereby a union in effect forced employers to agree in advance not to do business with other employers with whom the union was not in agreement. It was not the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit. *NLRB* v. *Joint Council of Teamsters No. 38,* 338 F. 2d 23, 28 (C.A. 9, 1964), and cases cited. In short, § 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. "Primary subcontracting claims, on the other hand, fall outside the ambit of § 8(e) . . . ." *Orange Belt District Council of Painters, No. 48* v. *NLRB,* 328 F. 2d 534, 537, 538 (C.A.D.C. 1964). An agreement banning the subcontracting of preparation work such as the one in the case at bar, not being a "hot cargo" agreement or on its face an attempt at a secondary boycott *in futuro,* § 8(e) does not apply.

We agree with the Board's dismissal of the complaint as to Local 22. We do not, however, agree with its dismissal of the complaint as to Local 113.

The problem presented by the refusal of the members of Local 113 to apply the pre-mitered fittings is so far as we know unique. As we have already pointed out Local 113 had no contract with Armstrong, although the Contractors Association of which Armstrong was a member had a contract with Local 22 which provided that members when operating outside the Local's jurisdiction "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and Local 113's bargaining contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Contractors Association. On this basis the Board held that "Whether Local 113 is regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22 it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." We do not agree.

The record is clear, as the trial examiner found, that mitering fittings would not have been done by members of Local 113 at the jobsite in Victoria, Texas, but would have been done by members of Local 22 employed by Armstrong at its shop in Houston. Thus the third party beneficiary theory is inapplicable because Local 113 would not have reaped any benefit from Local 22's contract. The agency theory has no factual support in the record. Moreover, we think the question presented by the behavior of Local 113 is not to be framed in terms of principles of the law of contracts or agency, developed in other contexts for other purposes.

The fact of the matter is that Local 113 put economic pressure on an employer with whom it had no collective bargaining agreement to secure benefits to employees in another unit Local 22. The question is whether such action by Local 113 comports with the underlying purposes and objectives of the Act. We think it does not.

Since Local 113 was not attempting to procure work for its members (they would not have done the mitering anyway) if it was not attempting to force Armstrong to cease and refrain from doing business with Thorpe, it was engaging in a controversy not its own but in Local 22's controversy with Armstrong. No doubt Local 113 had an emotional interest in coming to the aid of its sister local. But it had no economic interest in Local 22's claim of breach of contract. We think an emotional interest is too weak to justify conduct which necessarily has coercive impact on a neutral employer. Even if, strictly speaking, Local 113 was not engaged in a secondary boycott, it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer. We think the thrust of the Act, particularly § 8(b)(4), as set out in many secondary boycott cases [4] is to require each union to restrict its economic coercion to its own labor disputes and not to use that weapon in aid of another union.

Since we are affirming the order of the Board in part and reversing it in part the basis for the Board's de-

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[4] See *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675, 692 (1951), in which the Court described the congressional objectives of the Act as ". . . of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

clining to pass on the involvement of the International Union, *i.e.*, its finding that neither local had violated the Act, is destroyed. The case must go back to the Board for decision of the question of the International Union's participation in Local 113's work stoppage.

The Order of the Board is enforced in part and reversed in part, and the case is remanded to the Board for further proceedings consistent with this opinion.

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